Suit Nos. 367/89, 462/89,
463/89 & 464/89

Trial Decision Reported At:
(1989), 60 Man. R. (2d) 82

IN THE COURT OF APPEAL OF MANITOBA

Coram: O'Sullivan, Huband, Twaddle, Lyon and Helper, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN
Appellant

- and -

DONALD VICTOR BUTLER
and **NORMA JEAN McCORD**
(Accused) Respondents

AND BETWEEN:

HER MAJESTY THE QUEEN
Respondent

- and -

DONALD VICTOR BUTLER,
and **NORMA JEAN McCORD**
(Accused) Appellants

R. H. Morrison
and **V. E. Toews**
for the Crown

G. A. Derwin
for the accused

Appeals heard:
March 2, 1990

Judgment delivered:
November 1, 1990

HELPER, J.A.

The Factual Background

The accused, Donald Victor Butler, owned and operated a business under the name Avenue Video Boutique at 510 Sargent Avenue in the City of Winnipeg, in Manitoba. Available for sale or rental at the shop were video movies, magazines, sexual devices, equipment and paraphernalia. As a result of the execution of search warrants on August 21, 1987 and October 29, 1987, the respondent, Butler, was charged in two separate indictments with a total of 250 counts under s. 159 [now s. 163] of the **Criminal Code**.

In the first indictment, Butler was charged with 3 counts of selling obscene matter, 41 counts of possessing obscene matter for the purpose of distribution or circulation, 128 counts of possession of obscene matter for the purposes of sale and 1 count of exposing obscene material to the public view.

In the second indictment arising from the October, 1987 investigation, Butler was charged with 2 counts of selling obscene matter, 74 counts of possessing obscene matter for the purpose of distribution or circulation and 1 count of exposing obscene matter to the public view.

The trial took place in November of 1988 before Mr. Justice Wright. Reasons for decision were delivered on August 25, 1989.

With regard to the first indictment, Wright, J. found Butler guilty on 6 counts of possessing obscene matter for the purpose of distribution or circulation and 6 counts of possessing obscene matter for the purpose of sale. Those 12 counts related to 6 films.

On the second indictment arising from the October, 1987 investigation, Wright, J. found Butler guilty on 4 counts of possessing obscene matter for the purpose of distribution or circulation. Those 4 counts related to 2 films.

The respondent, Norma McCord, was in charge of Butler's commercial premises on October 29, 1987, when the second search warrant was executed. She was jointly charged with Butler on the second indictment. Wright, J. found her guilty on the counts relating to those same 2 films.

Because the findings of guilty relating to Butler involved a total of 8 films, the learned trial judge entered convictions on 8 offences rather than 16. Convictions against McCord were entered on 2 counts relating to the 2 films in the second indictment on which she was jointly charged. Acquittals were entered with respect to all remaining counts.

Butler was fined the sum of $1,000 on each conviction for a total of $8,000. McCord was fined $500 on each conviction for a total of $1,000.

The Crown appealed the 242 acquittals entered by the learned trial judge involving Butler. The Crown has not appealed the 75 acquittals entered by Wright, J. involving McCord.

Originally, Butler sought leave to appeal only against sentence. At the hearing it was acknowledged by counsel that, given the finding of obscenity, the accused are entitled to be acquitted on all counts if the obscenity provisions in the **Code** are struck down as being an infringement of freedom of expression as set out in s. 2(b) of the **Charter** and are not saved under s. 1, the limitation section. Counsel for Butler sought leave to amend his notice of appeal to include an appeal against conviction. Leave was granted.

McCord appealed her convictions on the 2 counts in the joint indictment and, in the alternative, in the event the convictions are upheld, sought leave to appeal her sentence.

The learned trial judge found that the materials which were the subject of the various counts were obscene within the meaning of s. 159(8) of the **Criminal Code.** (I will refer throughout the decision to the present section number being s. 163 of the **Criminal Code.**) However, he found that s. 163 infringed s. 2(b) of the **Charter** and, in relation to the materials included in the counts upon which the acquittals were entered, such an infringement could not be justified under s. 1 of the **Charter**. I will deal later in these reasons with the finding.

He concluded that all of the material referred to in the 250 counts before him was "obscene" as defined by s. 163(8) of the **Criminal Code**. No substantial argument was mounted to challenge Wright, J.'s finding. I, therefore, do not intend in these reasons to deal with that determination.

I Do the provisions of s. 163 of the Criminal Code infringe freedom of expression as set forth in s. 2(b) of the Charter?

Section 163 of the **Criminal Code** reads as follows:

> "**163.** **(1)** Every one commits an offence who
> (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or
> (b) makes, prints, publishes, distributes, sells or has in his possession for the purposes of publication, distribution or circulation a crime comic.
>
> **(2)** Every one commits an offence who knowingly, without lawful justification or excuse,
> (a) sells, exposes to public view or has in his

possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever;

(b) publicly exhibits a disgusting object or an indecent show;

(c) offers to sell, advertises or publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage; or

(d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

(3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section, the motives of an accused are irrelevant.

(6) Where an accused is charged with an offence under subsection (1), the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

(7) In this section, 'crime comic' means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(a) the commission of crimes, real or fictitious; or

(b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue

> exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene."

Freedom of Expression

> "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:
>
> **Guarantee of Rights and Freedoms**
>
> **RIGHTS AND FREEDOMS IN CANADA.**
>
> 1. The **Canadian Charter of Rights and Freedoms** guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The above-quoted constitutes the statement of principles and the first section of the **Canadian Charter of Rights and Freedoms.** It is significant that s. 1, which deals with limitations on rights and freedoms, precedes the articulation of those enshrined rights and freedoms. I bear in mind that significance when examining the meaning to be attributed to "expression" in s. 2(b) of the **Charter.**

In **R. v. Therens** (1985), 45 C.R. (3d) 97, a Supreme Court decision, Le Dain, J. expressed the opinion that because of its constitutional character, the **Charter** must be regarded by the courts as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection, unlike the Canadian Bill of Rights. At p. 120 of the decision, he stated:

> "...By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts..."

Words used in the **Charter** should not be presumed to have the same meaning as similar words already subject to judicial interpretation at the time the **Charter** was enacted. Borins, Co. Ct. J. in **R. v. Doug Rankine Company Ltd. and Act III Video Productions Ltd.** (1983), 36 C.R. (3d) 154 (Ont. C.A.), agreed that the **Charter** gave rise to a "heightened respect for freedom of expression."

Section 2 of the **Charter** states:

> **"Fundamental Freedoms**
>
> **FUNDAMENTAL FREEDOMS.**
>
> 2. Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association."

In **Irwin Toy Ltd. v. Quebec (Attorney-General)**

(1989), 58 D.L.R. (4th) 577 at p. 606, Dickson, C.J.C. stated as follows:

> "'Expression' has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, 'fundamental' because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.
>
> . . . .
>
> We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and **prima facie** falls within the scope of the guarantee..."
>
> (emphasis is mine)

The principles and values upon which the protection of free expression in society rests were examined by the Supreme Court of Canada in **Ford v. Quebec (Attorney-General)** (1988), 54 D.L.R. (4th) 577 at 617:

> "Various attempts have been made to identify and formulate the values which justify the constitutional protection of freedom of expression. Probably the best known is that of Professor Thomas I. Emerson in his article, 'Toward a General Theory of the First Amendment' (1963), 72 Yale L.J. 877,

where he sums up these values as follows at p. 878:

> The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in society.

The third and fourth of these values would appear to be closely related if not overlapping. Generally the values said to justify the constitutional protection of freedom of expression are stated as three-fold in nature, as appears from the article by Professor Sharpe referred to above on 'Commercial Expression and the Charter', where he speaks of the three 'rationales' for such protection as follows at p. 232:

> The first is that freedom of expression is essential to intelligent and democratic self-government . . . The second theory is that freedom of expression protects an open exchange of views, thereby creating a competitive market-place of ideas which will enhance the search for the truth . . . The third theory values expression for its own sake. On this view, expression is seen as an aspect of individual autonomy. Expression is to be protected because it is essential to personal growth and self-realization.

While these attempts to identify and define the values which justify the constitutional protection of freedom of expression are helpful in emphasizing the most important of them, they tend to be formulated in a philosophical context which fuses the separate questions of whether a particular form or act of expression is within the ambit of the interests protected by the value of freedom of expression and the question whether that form or act of expression, in the final analysis, deserves protection from interference

> under the structure of the Canadian Charter and the Quebec Charter. These are two distinct questions and call for two distinct analytical processes. The first, at least for the Canadian Charter, is to be determined by the purposive approach to interpretation set out by this court in **Hunter v. Southam Inc.** (1984), 11 D.L.R. (4th) 641, 14 C.C.C. (3d) 97, [1984] 2 S.C.R. 145, and **Big M Drug Mart Ltd., supra**, [[1985] 1 S.C.R. 295]. The second, the question of the limitation on the protected values, is to be determined under s. 1 of the Charter as interpreted in **Oakes, supra**, [(1986), 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321, [1986] 1 S.C.R. 103] and **R. v. Edwards Books & Art Ltd.** (1986), 35 D.L.R. (4th) 1, 30 C.C.C. (3d) 385, [1986] 2 S.C.R. 713. The division between the two analytical processes has been established by this court in the above decisions. First, consideration will be given to the interests and purposes that are meant to be protected by the particular right or freedom in order to determine whether the right or freedom has been infringed in the context presented to the court. If the particular right or freedom is found to have been infringed, the second step is to determine whether the infringement can be justified by the state within the constraints of s. 1. It is within the perimeters of s. 1 that courts will in most instances weigh competing values in order to determine which should prevail."

The principles referred to in **Ford**, supra, are consistent with the remarks of Douglas, J. of the Supreme Court of the United States in **Roe v. Wade**, 410 U.S. 113 at p. 211 where in examining the purposes of the freedom of speech and press clause of the First Amendment, he stated the principles to be as follows:

> "(1) to ensure that the democratic system of government established by the Constitution remains intact and operates as it should;

> (2) to assist in the advancement of knowledge and the discovery of truth;
>
> (3) to ensure that each individual member of society is free to develop his or her own 'intellect, interests, tastes and personality.' "

Although reference to the American jurisprudence can be helpful in interpreting the Canadian **Charter** or parts thereof, it must be borne in mind that the United States Constitution has no provision similar to s. 1 dealing with limits on rights and freedoms. Therefore, in examination of rights and freedoms, Canadian courts must exercise caution and resist American analysis which suggests that some forms of expression do not qualify for constitutional protection. Precisely because limits are contemplated, Canadian courts should take the broadest possible view of what constitutes expression.

The Supreme Court of Canada pointed out in **R. v. Big M Drug Mart**, [1985] 1 S.C.R. 295 that a purposeful approach is required to determine the meaning and definition of rights and freedoms in the **Charter**. The court directed its attention to the larger objects of the **Charter** itself, to the language chosen to articulate the rights and freedoms, to the historical origins of the concept enshrined and to the meaning of other specific rights or freedoms within which it is associated in the text of the **Charter**.

> "The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society." Dickson, C.J.C. in **R. v. Oakes** (1986), 26 D.L.R. (4th) 200 at p. 225.

Relying heavily upon the opening sentence of the above quotation from **R. v. Oakes**, supra, the Ontario Court of Appeal in **R. v. Zundel** (1987), 35 D.L.R. (4th) 338 and **R. v. Andrews** (1988), 43 C.C.C. (3d) 193; 65 O.R. (2d) 161, concluded that specific forms of expression are not protected under s. 2(b) of the **Charter**. Such a conclusion is dangerously similar to the American analytic process.

In **Zundel**, the Ontario Court of Appeal, in concluding that s. 177 [now s. 181] of the **Criminal Code** does not infringe freedom of expression, attempted to define rights and freedoms referred to in the **Charter**. Rights were defined positively as what a person can do, whereas, freedoms were defined by determining the area of the law which was regulated and that which was not. The court, in accepting that fundamental freedoms were not unlimited, determined protected freedoms to be only those which exist in the unregulated areas. Types of expressions which were restricted for the purposes of decency and public order such as expressions identified in s. 177 of the **Criminal Code** fell into the regulated, unprotected area.

It is of interest to note that the court did go on **in obiter** to say that even if s. 177 was found to be an infringement of the freedom of expression the legislation was justified under s. 1 of the **Charter**.

The dicta in **Zundel** was adopted by the majority in **R. v. Andrews**, supra. On the basis that freedom of expression was not absolute and that hate mongering is completely antithetical to the freedoms set forth in the **Charter**, the majority concluded protection of hate mongering is not available under s. 2(b).

With respect, I prefer the dissenting reasons of Cory, J.A. (as he was then) in the **Andrews** case in finding the legislation infringed freedom of expression, but was justified under s. 1 of the **Charter**. He stated at p. 199 of the reported case:

> "Freedom of thought is of limited value without the freedom to express

> that thought, to advocate the adoption of a new concept or the termination of an institution that has become outmoded or unfair. The exchange of ideas is vital to a democratic form of government and to its citizens. Without it democracy simply cannot survive."

He went on to cite the remarks of Dean Cohen at pp. 60 and 61 of the **Report of the Special Committee on Hate Propaganda in Canada** (1966):

> "It is our opinion that the Canadian people already have made the decision that as among conflicting values, preference must always be given to freedom of expression rather than to legal prohibitions directed at abuses of it. This is not to say that freedom of expression is regarded as an absolute, but only to insist that it will be esteemed more highly and weighed more significantly in the legislative scales, so that legal markings of the borderline areas will always be such as to permit liberty even at the cost of occasional license. But at some point that liberty becomes licence and colours the quality of liberty itself with an unacceptable stain. At that point the social preference must move from freedom to regulation to preserve the very system of freedom itself."
>
> (emphasis is mine)

In an attempt to distinguish **Zundel**, Cory, J.A. noted the trial judge in that case found (1) the appellants had published a statement knowing it to be false, and (2) that it was likely to cause harm. He agreed such action was clearly antithetical to the intent of the **Charter**. However, he points out in **Andrews**, supra, the appellants were expressing a sincerely held belief and thus such expression should come within s. 2(b) of the **Charter**.

I cannot accept any such distinction. Expression, whether it be antithetical to the **Charter** or not, can be limited only under s. 1 of that same document. Any distinctions dealing with limitations on expression must be dealt with under s. 1 of the **Charter**. **Charter** protection under s. 2 rests not upon the type of expression involved. Rather **Charter** protection depends upon whether or not a meaning or idea is being communicated. No other interpretation can be attributed to the statement from **Big M Drug Mart**, supra.

The Alberta Court of Appeal in **R. v. Keegstra**, [1988] 5 W.W.R. 211, contrary to the Ontario Court of Appeal in **Zundel** and **Andrews**, found that imprudent speech giving rise to a charge under s. 281.2 [now s. 319] of the **Criminal Code** is indeed protected under s. 2(b).

Whether one interprets the materials in this appeal as portraying human physical interaction or a way of life, as educating the uninitiated or presenting a variety of human sexual experiences or as mere entertainment, there is meaning. An idea is being conveyed. Sometimes even a story is being told, as poor a story as it may be. Whether or not that idea is offensive or in poor taste is not in issue. One cannot possibly draw a comparison between activity such as parking an automobile or taking a stroll and the activity recorded in the films included in the two indictments. The latter is expression, the former may not be. The degree of offensiveness of the materials cannot be the criteria for determining whether or not the expression comes within the meaning of s. 2(b) of the **Charter**.

Meaning cannot be equated with the social or moral value of the expression. Because materials lack social value, it does not follow they also lack meaning. In Canada, it is only when the meaning or idea being conveyed is shown to be injurious or has the potential for injury that limitations can be imposed; e.g., laws on treason, defamation, slander. It is in that context that the freedoms enunciated are not absolute.

In the following cases the courts have determined that the obscenity provisions of s. 163 infringe freedom of expression: **R. v. Wagner** (1985), 43 C.R. (3d) 318 (Alta. Q.B.); **R. v. Red Hot Video Ltd.** (1985), 18 C.C.C. (3d) 1 (B.C.C.A.); **R. v. Ramsingh** (1984), 14 C.C.C. (3d) 230 (Man. Q.B.); **Nightengale Galleries Ltd. v. Director of Theatres Branch** (1984), 48 O.R. (2d) 21 (Co. Ct.).

The Supreme Court of Canada in **Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)**, [1990] 1 S.C.R. 1123 found s. 195.1(1)(c) of the **Criminal Code** inconsistent with s. 2(b) of the **Charter**. Lamer, J. stated in concurring reasons that only activities which convey a meaning through a violent form of expression which directly attacks the physical liberty or integrity of another person would be outside the protection of s. 2(b).

Of particular note are the remarks of Anderson, J.A., of the British Columbia Court of Appeal, at pp. 22 and 23 of **Red Hot Video Ltd.**, supra:

> "It will also be observed that s. 2(b) of the Charter narrows the scope of s. 159(8) of the **Code**. Any limitation on freedom of expression must meet the strict requirements of s. 1 of the Charter, namely, that the limitation is reasonable and such 'as can be demonstrably justified in a free and democratic society'. We must be careful, therefore, not to prohibit the publication of materials for the sole reason that the materials do not meet with popular approval or do not appeal to popular tastes. In my view, a restriction on freedom of expression can only be 'demonstrably justified' if it can be shown that the material sought to be banned from publication causes or threatens to cause real and substantial harm to the community. In this respect, it is my opinion that publication of material placing excessive emphasis on explicit sex with violence, explicit sex involving children and explicit sex portraying human beings as having animal characteristics results in substantial harm to the community and we are thus justified in prohibiting the publication of such material.
>
> . . . .

> In conclusion, I would stress that we must be careful not to restrict freedom of expression beyond what is clearly required for the protection of society. We cannot ban the publication of all harmful or offensive material involving the subject of sex. At the expense of repetition the only material that can be banned is material which is clearly offensive, explicit, excessive and substantially harmful, in the manner described above."

In defining the freedom of expression provision, Houlden, J.A. in **R. v. Kopyto** (1987), 62 O.R. (2d) 449 stated at p. 451:

> "A court should only find that expression falls within the regulated area not protected by s. 2(b) of the **Canadian Charter of Rights and Freedoms** where the conduct is clearly antithetical to the freedom conferred by s. 2(b). The regulated area must, if freedom of expression is to have meaning, be very narrow in scope. Expression of opinion about the conduct of judges or courts after a case has been decided, no matter how vitriolic, scurrilous or vilifying, are not antithetical to the freedom of expression conferred by s. 2(b) of the Charter and hence should not be placed in the regulated area..."

The Ontario Court of Appeal in **Re Information Retailers Association of Metropolitan Toronto Inc. and Municipality of Metropolitan Toronto** (1985), 22 D.L.R. (4th) 161, in dealing not with obscenity but rather with by-laws restricting books or magazines designed to appeal to sexual or erotic appetites, held that s. 2(b) of the **Charter** protection applies to all phases of expression from the writer, artist and photographer through to distributor and retailer and on to reader and viewer. It was held that the freedom to distribute and sell is as essential as the freedom to publish, for without the means of disseminating expression, the publication would be of little value.

I concur with that determination. Reading the **Charter** as a whole, accepting the purposeful approach to interpretation of the **Charter** and the need to preserve basic values in a free society, I adopt and would apply a broad liberal meaning to "freedom of expression."

Both the purpose and effect of s. 163 is an attempt to single out a type of expression in order to control access by others to a meaning being conveyed or to control the ability of one to convey that meaning. The materials that form the subject of the two indictments before the court come within the provisions of s. 2(b) of the **Charter** and s. 163 of the **Criminal Code** is an infringement of freedom of expression. The answer to the first question is "yes."

II Can the limitation of s. 163 be justified under s. 1 of the Charter?

The need to address the meaning of "reasonable limits" was recognized early in the development of the **Charter.** Clare Beckton in **The Canadian Charter of Rights and Freedoms: Commentary** (1982), Tarnopolsky and Beaudoin, at p. 107 stated as follows:

> "With the entrenchment of s.2(b.) of the Charter the Supreme Court will have to face squarely the limits of censorship. Clearly statutes which create censorship boards without specific criteria would be contrary to the guarantees of free expression, since no line is drawn between objectionable and non-objectionable forms of expression. Now standards will have to be created to measure the limits to which obscene expression may be regulated."

She appears to have assumed obscenity is a form of expression which requires limits.

The principles enunciated by Dickson, C.J.C. in **R. v. Oakes**, supra, are well paraphrased in the headnote at p. 201:

> "...Section 1 of the Charter has two functions. It constitutionally guarantees the rights and freedoms set out in the provisions which follow and it states explicitly the exclusive justificatory

> criteria against which limitations on those rights and freedoms must be measured. The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. While the standard of proof under s. 1 is the civil standard of proof by a preponderance of probabilities, this test must be applied rigorously and where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the court the consequences of imposing or not imposing a limit. The court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. However, there may be cases where certain elements of the s. 1 analysis are obvious or self-evident. To establish that a limit is justified under s. 1, two central criteria must be satisfied. First, the objective which the measures responsible for a limit on a Charter right or freedom are designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right or freedom and secondly, the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This latter criterion involves a form of proportionality test which has three important components. First, the measures adopted must be carefully designed to achieve the objective in question. The measures must not be arbitrary, unfair or based on irrational considerations but must be rationally connected to the objective. Secondly, the means should impair as little as possible the right or freedom in question. Finally, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of sufficient importance. Thus, the more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."
>
> (emphasis is mine)

The underlined portions have become the accepted test to be applied to legislation found to infringe basic freedoms.

I turn now to the first part of the test.

1. The Objectives of the Legislation

Wright, J. determined that the objective of s. 163 was to control the morals of society and to encourage decency. He concluded, relying upon the failure of Dickson, C.J.C. to include morality or decency when listing the values and principles underpinning a democratic society, that such objectives failed to meet the pressing or substantial needs test enunciated in **Oakes**, supra. He determined that more specific or substantial objectives are required to justify such a limitation under s. 1. He identified equality rights, dignity of the human person or rights identified in the **Charter** of sufficient concern to warrant legislative inference. Although finding s. 163 incapable of being justified under s. 1, Wright, J. upheld the section. He found all the material obscene but acquitted the accused on all but eight counts because only the material which was the subject of those eight counts was justifiably proscribed by s. 1. Clearly, the learned trial judge applied the test in **Oakes** incorrectly. Instead of dealing with the legislation under s. 1, he subjected the materials described in the various counts to the scrutiny of s. 1. He found the materials obscene, but not sufficiently harmful to warrant a criminal conviction. Interestingly enough, if Wright, J. had determined that the subject materials were obscene because they attacked the dignity of the human person, he might very well have reached a different conclusion.

In the Alberta Queen's Bench decision of **R. v. Wagner**, supra, Shannon, J. found the objectives of s. 163 extend beyond the issues of morality and decency. The evidence presented at trial showed that repeated exposures to sexually violent or degrading and dehumanizing pornography resulted in social harm in the form of increased callousness towards women and less receptiveness to their legitimate claims for equality and respect. Such concerns in society were found to be justifiably addressed by limitations upon the freedom of expression.

That conclusion is consistent with concerns expressed to the committee responsible for the preparation of the Fraser Report, **Pornography and Prostitution in Canada; Report of the Special Committee on Pornography and Prostitution**, 1985, Volume 1, Chapter 4. At p. 67 of the Report, the following is stated:

> "The effect of pornography on women, children and society was described in considerable detail in many briefs [presented to the Committee]. The concern of most participants was threefold: that pornography degrades women, robs them of their dignity as individual human beings and equal partners within a relationship and treats them as objects or possessions to be used by men; that male violence against women is treated as socially acceptable and viewers are desensitized to the suffering of others; and thirdly, that these two influences will have a strong negative influence on children and on the family."

Further in the Report at p. 103:

> "Because of the seriousness of the impacts of this sort of pornography on the fundamental values of Canadians, we are prepared to recommend that the Criminal Code has an important role to play in defining what material may be available within our society. Where it is not so clear that the material has the impact described above, we are suggesting instead of criminal prohibition more restricted access than is currently the case."

Those same conclusions and concerns are consistent with the U.S. **Final Report of the Attorney General's Commission on Pornography**, published in 1986. Chapter 5 of that report deals with **The Question of Harm**. At p. 39, it is stated:

> "When clinical and experimental research has focused particularly on sexually violent material, the conclusions have been virtually unanimous. In both clinical and experimental settings, exposure to sexually violent materials has indicated an increase in the likelihood of aggression. More specifically, the research...shows a causal relationship between exposure to material of this type and aggressive behavior towards women."

At p. 40:

> "...The evidence says simply that the images that people are exposed to bears a causal relationship to their behavior.
>
> ....
>
> ...The evidence is also strongly supportive of significant attitudinal changes on the part of those with substantial exposure to violent pornography. These attitudinal changes are numerous. Victims of rape and other forms of sexual violence

> are likely to be perceived by people so exposed as more responsible for the assault, as having suffered less injury, and as having been less degraded as a result of the experience. Similarly, people with a substantial exposure to violent pornography are likely to see the rapist or other sexual offender as less responsible for the act and as deserving of less stringent punishment."

At p. 41, the report goes on in dealing with nonviolent materials depicting degradation, domination, subordination, or humiliation. The report states that effects similar to although not as extensive as that involved with violent material can be identified with respect to degrading material, but that these effects are likely absent when neither degradation nor violence is present. The degradation referred to is that of people, mostly women, in material which, although not violent, depicts those people as existing solely for the sexual satisfaction of others, usually men, or that depicts women in decidedly subordinate roles in their sexual relationship with others or that depicts people engaging in sexual practices that would to most people be considered humiliating. Indeed, forms of degradation represent the largely predominant proportion of commercially available pornography. The report concludes the substantial exposure to material of this type will increase acceptance of the proposition that women like to be forced into sexual practices, and, once again, that the woman who says "no" really means "yes."

Professor Louise Arbour (now Justice Arbour of the Ontario Court of Appeal), in her article **The Politics of Pornography: Towards an Expansive Theory of Constitutionally Protected Expression**, published in Weiler and Elliot's **Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms**, at p. 295 refers to the Metro Toronto Task Force on Public Violence Against Women and Children, Final Report (1984) at p. 66:

> "As a form of Sexual Propaganda, pornography both promotes and encourages the degradation and exploitation of women...many women maintain that pornography is the ideology of a society which creates complacency about rape, wife battering and other forms of violence against women."

At p. 74 of the same report, it was argued that "violent and aggressive pornography is a direct contributor to violent and aggressive behaviour."

It was and is a legitimate objective of Parliament to prevent the publication and circulation of materials depicting cruelty, dehumanization, degradation and violence. Evidence shows the circulation of such material may lead to an increase in the incidence of aggressive, harmful behaviour and further can lead to attitudinal changes that are antithetical to the **Charter**, specifically to s. 28 of the **Charter**.

The question of harm to society was specifically addressed by all justices of the Supreme Court in **Reference re ss. 195 and 195.1(1)(c)**, supra, when dealing with s. 1 of the **Charter**.

Contrary to the learned trial judge's determination that morality is not a sufficient basis for imposing limitations on fundamental freedoms, there is ample jurisprudence in support of the proposition that morality is a cornerstone of the criminal law and that morality is a legitimate rationale for the proclamation of law. **R. v. Big M Drug Mart**, supra. It may be arguable that morality in the narrow sense of moral indignation is not sufficient to sustain a limitation. However, morality in the broader sense, as in the present case, encompassing respect for human beings, protection of the public generally or of vulnerable individuals or groups of the public from harm is a sufficiently pressing and substantial objective warranting intervention of Parliament.

The Crown's submitting evidence obtained subsequent to the passing of the legislation does not weaken its position given the objectives which remain pressing and substantial in our society. The proliferation of video movies, and Betamax and VHS equipment, heightens the concern that potentially harmful material has become a greater threat to society.

Dickson, C.J.C. stated in **Irwin Toy Ltd. v. Quebec (Attorney General)**, supra, at p. 618:

> "Where the basis for its legislation is not obvious, the government must bring forward cogent and persuasive evidence demonstrating that the provisions in issue are justified having regard to the constituent elements of the s. 1...inquiry: see **R. v. Oakes**, supra, at pp. 226-7. In showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert **post facto** a purpose which did not animate the legislation in the first place (see **R. v. Big M Drug Mart**, supra, at pp. 352-3: However, in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available. The same is true as regards proof that the measure is proportional to its objective: See **R. v. Edwards Books & Art Ltd.** (1986), 35 D.L.R. (4th) 1 at p. 41...It is equally possible that a purpose which was not demonstrably pressing and substantial at the time of the legislative enactment becomes demonstrably pressing and substantial with the passing of time and the changing of circumstances."

The concerns of Parliament to protect society from the dissemination of material depicting violence, cruelty and dehumanizing and degrading behaviour were and are sufficient objectives for the imposition of limits on the freedom of expression.

2. Justification under Section 1

As directed by Dickson, C.J.C., the second part of the **Oakes** test is divided into three parts. The first question to be addressed in part 2 is:

(a) Are the measures rationally connected to the objective?

The court must consider whether the measures adopted, that is, the prohibitions, are designed to achieve the objectives determined to be pressing in society. Accepting that the legislature has included in its objectives the recognition of the equality of the sexes, protection of the public against violence and cruelty, the protection of children against exposure to potentially harmful material and the need to recognize human dignity, the onus is upon those seeking to sustain the limitation to satisfy the court that the measures chosen are not arbitrary, vague, unfair or based on irrational considerations.

Obscenity - Section 163(8)

For a proper examination of the first part of the proportionality test, it is necessary to examine the definition of obscenity as set forth in s. 163(8) and the application of that definition.

Material is obscene under s. 163(8) of the **Criminal Code** if it contains as a dominant characteristic the undue exploitation of sex. In determining what is "undue", one of the tests that may be applied is the Canadian contemporary community standards of tolerance test. **R. v. Towne Cinema**, [1985] 1 S.C.R. 494. One must bear in mind when examining the **Towne Cinema** case that the court was not dealing with the definition of obscenity. Rather, accepting that s. 163(8) was to be assessed on the basis of the community standard of tolerance, the court was seeking to clarify the application of that standard.

In dealing with the application of the test, the court did not decide that s. 163(8) included sexual behaviour which could be described as degrading, dehumanizing or humiliating. It can be argued that "undue exploitation" of sex includes such depictions. However, even if that argument is accepted, the test of a community standard of tolerance is still open to attack.

In applying the test, the task is to determine what is tolerable in accordance with contemporary standards of the Canadian community as a whole, not what is tolerable in accordance with one's own personal taste or the standard of tolerance of any specific community. What matters is not what Canadians think is right for themselves to see but what Canadians would not abide other Canadians seeing because it exceeds the contemporary Canadian standard of tolerance to allow them to see it.

Dickson, C.J.C. in **Towne Cinema**, supra, stated that no evidence is required to determine the contemporary community standard of tolerance. The court was not unanimous in this position although the majority agreed that expert evidence of a contemporary community standard of tolerance is not required. It was Dickson's opinion that evidence of the audience receiving the material may be relevant because Canadians might tolerate one group of individuals viewing material which would exceed the standard of tolerance if viewed by another audience, e.g., the same material being seen by a group of university academics and a group of school children. Again this position was not unanimously adopted by the court.

The court is required to determine objectively what the community standard is and then determine subjectively if the materials in question exceed that standard. Instead of evidence, the court may rely upon his or her own experience and knowledge. The difficulty with the application of such a test was identified by Wright, J.

At trial, the only evidence presented dealing with the standard was judicial precedent. Wright, J. found the obligation to rely upon his own experience and knowledge inconsistent with basic judicial legal principles. Experience and knowledge will vary from judge to judge and the perception of the Canadian contemporary community standard of tolerance will also vary from judge to judge, from one area of the country to another area of the country and, as Dickson, C.J.C. noted, from audience to audience. As a result the limitation on freedom of expression will vary from court to court, province to province and time to time. Can such a test be found to be anything but vague and arbitrary?

Difficulties in the application of such a test were also identified in the U.S. case of **Jacobellis v. Ohio** 378 U.S. 184, a 1964 decision. The court confronted the problem of "contemporary community standard." The majority determined that the phrase referred not to the standards of a particular local community from which the case arose, but to the standards of the community at large, that is, a national community standard. Therefore, obscenity could have a "varying meaning from time to time" but "not from county to county or town to town, even though local communities throughout the country are diverse in nature" (at p. 193). Materials or behaviour proved to be intrinsically harmful cannot only with the passage of time lose that quality. The community standard of tolerance test is not an adequate guide for the imposition of criminal sanctions. Additionally, the application of such a test will result in decisions taken in one community of the nation which may be relevant and significant but totally inappropriate or ineffective in another community of the country.

The argument challenging s. 163(8) as being too vague was rejected in **Red Hot Video, R. v. Wagner and R. v. Ramsingh**. Given the inconsistencies in the jurisprudence in recent years, I am not persuaded by those decisions. In **R. v. Video World Ltd.**, [1986] 1 W.W.R. 413, the Manitoba Court of Appeal, using the same standard as the trial judge, overturned the trial court's determination that the material in question was not obscene. There was no constitutional question before the court.

As pointed out by Madam Justice Wilson, in her dissenting decision, in **Towne Cinema**, supra, the line between what does or does not exceed the Canadian contemporary standard of tolerance is often indefinable and vague.

At p. 523, she stated:

> **"How is the court to determine where the line is drawn? By guidelines read into the definition as a matter of interpretation of the word 'undue'? By consideration of the presumed social ills sought to be avoided by restrictions on freedom of publication? By statistics showing what people are prepared to look at and what they are not? The courts have said that the test is an objective one and clearly that must be so. But objectivity requires criteria and the courts have not been**

> too successful in evolving them. Yet this is a criminal offence and it is basic to our system of criminal justice that the public know what conduct is criminal and what is not."

Vague laws may entrap the innocent by not providing fair warning and a vague law delegates policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis with the attendant dangers for arbitrary and discriminatory enforcement. Uncertain meanings inevitably lead citizens to steer far wider from the unlawful zones than if the boundaries of the forbidden areas were duly marked. A court that keeps these concerns in mind should be prepared always to hold legislators to a fairly strict standard of precision when they act to curb freedom of expression.

While some courts have found that sexually explicit erotica portraying positive and affectionate human sexual interaction between consenting individuals participating on the basis of equality will be tolerated, **R. v. Wagner**, supra, other courts have determined that any form of sexual explicitness which is portrayed for the sole purpose of entertainment, titillation or explicitness for explicitness' sake is undue exploitation: **R. v. Video World Ltd.**, supra.

The role of judicial discretion in dealing with vague legislation was addressed at p. 617 of the **Irwin Toy** decision:

> "Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no 'limit prescribed by law'."

The recognition that there exists a power of discretion in the judiciary where standards are imposed is not an adequate response to the charge that s. 163(8) is vague and the application of the definition unpredictable.

The standard to be applied in dealing with s. 1 of the **Charter** is strict in order to preserve the integrity of the democratic system. Limits proscribed by law must be precise. If there is to be error, let the error be on the side of precision and narrowness rather than on the side of unwarranted expansive intrusions. If Parliament, in seeking to address the harmful effects of the dissemination of certain material, wishes to proscribe the sale or distribution of sexual material portraying dehumanizing and degrading behaviour, cruelty, violence and the sexual exploitation of children, let them so do. However, Parliament chose the terminology "undue exploitation of sex" in s. 163(8) and by so doing left the criteria for the application of the standard tc the judiciary. It is not the judicial function to define the material or actions which are to be proscribed by law. Parliament has abdicated its responsibility in s. 163 of the **Code**. The present law which fails to define with precision the limit on sexual expression is too arbitrary and too vague to withstand the scrutiny of s. 1.

The second and third parts of the proportionality test require responses to the following two questions:

(b) Is the extent of the limitation reasonable to meet the objectives? and

(c) Is there a balance between the fundamental freedom and the limitation imposed?

Even if I were able to accept the submission that the legislation is not arbitrary or vague and that "undue exploitation" includes all and only legitimate concerns of Parliament, I have determined that the Crown has failed to meet the onus upon it under the second and third parts of the **Oakes** proportionality test. The legislation is too broad. It does not impair as little as possible the freedom of expression. In fact, this case demonstrates the far reaching effect of the legislation.

Section 163(8) proscribes the publication, sale or distribution of material found to be obscene. The test is the standard of tolerance of the contemporary community. As a result of the subjective application of an objective test, one who deals with material found to be obscene although containing no element of cruelty, dehumanization, violence or degradation could be convicted under the **Criminal Code** of an offence in the absence of any evidence of harm or risk of harm to society. It was on this basis that the Alberta Court of Appeal struck down s. 281.2 of the **Criminal Code**, **R. v. Keegstra**, supra. Similarly, s. 163(8), which casts such a broad net by way of its application, cannot be sustained under the proportionality test.

At p. 102 of the **Fraser Report**, the Committee clearly identified that the **Criminal Code** has an important role to play in proscribing material which has serious impact on the fundamental values of Canadians. But where the distribution of material is not shown to have the same serious impact, where there is no harm intended or effected, criminal prohibitions may not be appropriate. Although material depicting sexual activity without marriage, love commitment or affection may give rise to promiscuity and may change the attitude towards the nature of the sexual act, there is no evidence or proof of any kind that material of this type results in harm to any element of society of sufficient pressing concern to warrant the imposition of criminal sanctions.

The Crown has failed to displace the onus upon it to prove that s. 163(8) is a reasonable limit demonstrably justified in a free and democratic society. Without the definition subsection the remaining provisions of s. 163 cannot stand. The answer to the second question posed is "No".

In the result, I would allow the appeals against conviction and enter acquittals on all charges against both accused.

J.A.